No. 12360.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GLENN O. PRICKETT, H. F. WINANS and S. E. WHITNEY, on behalf of themselves and other employees similarly situated,

Appellants,

vs.

CONSOLIDATED LIQUIDATING CORPORATION,

Appellee.

APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

I.

Jurisdiction.

The District Court's jurisdiction to entertain the claims of the three original plaintiffs and the seven appellant-claimants has been consistently challenged by appellee at all stages of the litigation to date. On this appeal this Court is primarily concerned with the jurisdictional limitations imposed by the Portal-to-Portal Act of 1947 which are noted hereinafter.

The jurisdiction of this Court of Appeals to consider and decide the instant appeal on merits is challenged by appellee, first, because the Order of Dismissal dated September 8, 1948 [Tr. pp. 38 and 39] is neither a "final decision" within the scope of 28 U. S. C., §1291, nor an appealable "interlocutory order" of any type described in

28 U. S. C., §1292; and secondly, because said Order, which dismisses some, but not all of the claims presented in the Amended Complaint, was not made appealable by "expressed determination" and "expressed direction" of the trial court, as required by subdivision (b) of revised Rule 54 of the Federal Rules of Civil Procedure.

II.

Statement of Facts.

The Statement of Facts contained in Appellants' Opening Brief is regarded as incomplete in certain particulars which are deemed pertinent to this appeal. Appellee directs attention to the following additional facts.

It should be noted at the outset that the designation in captions of both the Transcript of Record and Appellants' Opening Brief of "Glenn O. Prickett, H. F. Winans and S. E. Whitney, on behalf of themselves and other employees similarly situated" as "Appellants" is misleading and erroneous. The Notice of Appeal states, and Appellants' Opening Brief confirms, that the present appeal is from only that portion of the District Court's order which dismisses the claims of seven claimants, namely, Charles R. Cobb, Frank Hemminger, Fred M. Koehler, Oliver H. Raftery, Charles E. Smith-Sanford, Samuel Tinker, and Luther M. Walters. Plaintiffs Prickett, Winans and Whitney have no personal interest in that portion of the Order and Appellants' Opening Brief (p. 4) indicates that they are not appellants herein.

Although the instant action was commenced in the District Court on January 16, 1947 by the three named plaintiffs, assertedly on behalf of themselves and "all other employees similarly situated" [Complaint, par. I; Tr. p.

2], there was no identification of any of the "other employees similarly situated" as claimants in the pending action at any time prior to the enactment of the Portal-to-Portal Act of 1947 on May 14, 1947.

Effective May 14, 1947, the Portal-to-Portal Act became applicable to the instant action. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432.) The identification of the seven appellants as claimants was made for the first time in a bill of particulars filed June 5, 1947. This bill of particulars did not satisfy the express requirements of the Portal-to-Portal Act that each claimant file his written consent to become a party plaintiff. No attempt whatever was made to comply with the requirements of the Portal-to-Portal Act until the filing of the Amended Complaint on April 6, 1949, which was more than twenty-three months after the enactment of the Portal-to-Portal Act, and more than twenty months after the 120-day grace period provided therein in favor of claimants such as appellants. Attached to the Amended Complaint filed April 6, 1949 were seven exhibits, each designated as a "Consent to Become Party Plaintiff," one signed by each individual appellant on a date between March 11 and April 1, 1949 [Tr. pp. 24-26].

III.

Appellee's Statement of Issues.

Appellants' Opening Brief assumes that there is presented to this court for decision the solitary question whether, as a condition of appellants' rights to litigate their claims in the pending action, it was necessary that they, as "employees similarly situated" to the three original plaintiffs, file in said action, within 120 days after the enactment of the Portal-to-Portal Act (*i. e.*, on

or before September 11, 1947) their several written consents to appear therein as parties plaintiff.

Appellee asserts that additional questions and matters are presented for disposition, and that they are more properly stated as follows:

(1) Does this Court of Appeals have jurisdiction to consider and determine the purported appeal by the seven appellants from the limited portion of the District Court's Order of September 8, 1949, stated in the Notice of Appeal dated September 8, 1949? [Tr. p. 40].

(2) As of May 14, 1947 (the effective date of the Portal-to-Portal Act of 1947), were the seven appellants sufficiently identified as "plaintiffs" in the present action to be excused from compliance thereafter with the substantive and procedural provisions of the said Act?

(3) Did the bill of particulars filed June 5, 1947, have the effect of excusing appellants as "employees similarly situated" from compliance thereafter with the requirement of Section 8 of the Portal-to-Portal Act of 1947 (29 U. S. C. 258), that claimants other than original plaintiffs file timely "written consents" to become parties plaintiff?

(4) Did the Amended Complaint filed April 6, 1949, state a claim for relief on behalf of appellants of which the District Court was shown to have jurisdiction?

IV.
ARGUMENT.

1. The Appeal Should Be Dismissed for Want of an Appealable Order.

No argument seems necessary to demonstrate that the District Court's Order of September 8, 1949 [Tr. pp. 38-39] is not a "final decision" within the scope of 28 U. S. C. §1291, because the Order leaves pending and undetermined in the District Court the claims of three original plaintiffs Prickett, Winans and Whitney. (See *City and County of San Francisco v. McLaughlin* (9 Cir., 1925), 9 F. 2d 390.) On its face, the Order does not purport to be one of the five classes of "interlocutory decisions" which are expressly made appealable by 28 U. S. C. §1292. Moreover, it does appear that the Order falls within the descriptive language of subdivision (b) of revised Rule 54 of the Federal Rules of Civil Procedure, which is applicable to "any order or other form of decision, however designated, which adjudicates less than all of the claims" presented in an action. As an order of the latter type, it is not appealable because the trial judge did not put into effect the condition precedent to appeal by directing the entry of a final judgment as to the seven appellants "upon an expressed determination that there is no just reason for delay." (See *Lockwood v. Hercules Powder Co.* (8 Cir., 1949), 172 F. 2d 775; *Kuly v. White Motor Co.* (6 Cir., 1949), 174 F. 2d 742.)

2. The Portal-to-Portal Act at All Times Since Its Enactment Has Been Applicable to Appellants' Claims.

As of May 14, 1947, the effective date of the Portal-to-Portal Act of 1947 (Chap. 52, Public Law 49, 80th Cong., 29 U. S. C. §251 *et seq.*), the instant litigation was in this posture: There was on file a complaint, filed by the three named plaintiffs Prickett, Winans and Whitney "on behalf of themselves and other employees similarly situated," who were indenominately described as shipyard workers employed by defendant as "maintenance electricians, marine electricians, stationary engineers, operating engineers, mechanical maintenance employees, tool room attendants, tool room mechanics, warehousemen, issue and receiving clerks, and in various other crafts and capacities" [Tr. p. 3]. This complaint did not refer by name to the seven appellants, nor to any of the several hundred other employees of the defendant who might come within the scope of the general description of workers above mentioned. Only two days prior to May 14, 1947, the trial court ordered plaintiffs to furnish a bill of particulars showing the names, job classifications, duties and periods of employment of each of the plaintiffs and the several other claimants, and plaintiffs' authorizations to sue on behalf of such other claimants.

Such was the status of the case on May 14, 1947. Approximately three weeks thereafter, to-wit, on June 5, 1947, there was filed by plaintiffs a bill of particulars which showed the names of the plaintiffs and other claimants similarly situated to them, their respective job classifications, and the approximate dates of employment, but which did not contain (as demanded by defendant, promised by plaintiffs and ordered to be furnished by the

court) any statement showing "(e) the date, form and nature of every authorization under which any of the plaintiffs assert the right to represent each such claimant in the pending action." [Tr. pp. 9 and 10.] Furthermore, said bill of particulars was not verified by any plaintiff or other claimant, or by counsel in their behalf.

It is the apparent contention of appellants that the bill of particulars which was filed June 5, 1947, cured the infirmities of the complaint as it stood on May 14, 1947, so far as it purported to present the claims of the seven appellants. In support of this position, appellants cite Rule 12(e) of the Federal Rules of Civil Procedure, to the effect that "a bill of particulars becomes a part of the pleading which it supplements." It is true that prior to its amendment, Rule 12(e) did contain the above quoted phrase; but this language has been stricken from the revised Rule and, in fact, all provisions for a bill of particulars have been deleted from the revised Rule. Under the circumstances, there is presented the academic question whether the bill of particulars in this case served any real function. However, it seems unnecessary to discuss or resolve such question on this appeal because the real issue is not whether a bill of particulars amends a pleading to which it is addressed, but whether appellants complied with the provisions of Section 8 of the Portal-to-Portal Act which they were required to observe within 120 days after May 14, 1947. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, and *Bonner v. Elizabeth Arden, Inc.* (2 Cir., 1949), 177 F. 2d 703.) Section 8 of the Act required that in the case of a collective or representative action commenced prior to May 14, 1947, the claim of an individual claimant who had not been specifically named as a party plaintiff should be barred unless, within 120

days after the enactment of the Act, his written consent to become a party plaintiff to the action be filed in the Court in which the action is brought (29 U. S. C., Sec. 258). No written consent or any other equivalent instrument signed by any of the seven appellants was filed in the trial court until April 6, 1949. Appellants seek to explain away this delay by arguing that they were not obligated to comply with the provisions of the Act which required the filing of written consents. In support of their position, they cite two Circuit Court decisions, neither of which is controlling for reasons which will be presently noted.

Central Missouri Telephone Co. v. Conwell (8 Cir., 1948), 170 F. 2d 641, is one of the two appellate court cases upon which appellants rely. This litigation involved the claims of two telephone operators, Conwell and Pinkepank, and was the subject of at least three court opinions (74 Fed. Supp. 542; 76 Fed. Supp. 398; and 170 F. 2d 641), from a reading of which can be gleaned an accurate chronology of the litigation and the status of both claimants during all stages of the litigation. Appellants' brief erroneously states that "Miss Conwell had filed the action on behalf of herself and a co-employee 'similarly situated.' The co-employee, Laura Pinkepank, did not appear as party plaintiff in the caption of the complaint, but was so described in the body of the complaint." (App. Op. Br. p. 8.) This statement is misleading. In the words of the trial judge (76 Fed. Supp. 396 at p. 403), "Actually Miss Pinkepank was named both in the caption and in the body of the complaint and throughout the complaint both claimants were consistently referred to as plaintiffs. Miss Pinkepank was named in the original complaint. While the caption recites that the action is brought by 'Lillie Conwell, individually and as representative of Laura Pinkepank,' Miss Pinkepank was in fact a plaintiff in this

action. It is my view that she was 'specifically named as a party plaintiff' at the time the complaint was filed." To similar effect, see the trial court's earlier opinion in 74 Fed. Supp. 542.

Gibbons v. Equitable Life Assurance Society (2 Cir., 1949), 173 F. 2d 337, is the second appellate court decision cited in Appellants' Opening Brief. The facts in the *Gibbons* case were clearly distinguishable from those in the instant case. There, a complaint was filed in October 1944, by Gibbons, suing in his own behalf and as agent and representative of "all employees" similarly situated. The complaint identified eight other employees by name, and alleged that Gibbons had been authorized by them to institute the action in their behalf. Shortly thereafter, and pursuant to stipulation, there were filed amendments to the complaint which in effect stated that Gibbons was suing on behalf of "certain," rather than "all" employees of defendant, followed by allegations which described the services performed by the nine named employees, including Gibbons, but no others. Thus, "long before the passage" of the Portal-to-Portal Act, the complaint as amended identified all parties plaintiff; and with respect to these nine claimants and no others, issues were joined approximately two years prior to the enactment of the Portal-to-Portal Act, so that as of that critical date there was no possibility that additional persons then unidentified would assert claims in the action. This was not the situation which obtained in the instant case as of May 14, 1947. Here, the three persons named as plaintiffs had not indicated, and the defendant had no reliable method for ascertaining which of its many hundreds of employees might ultimately claim to be included within the uninformative descriptive phrase, "employees similarly situated."

Appellants' Opening Brief also cites District Court decisions rendered in the two *Bartels* cases (*Bartels v. Sperti, Inc.* (D. C. S. D., N. Y. 1947), 13 L. C. Par. 63994; 73 Fed. Supp. 751, and *Bartels v. Piel Bros., Inc.* (D. C. E. D., N. Y. 1947), 74 Fed. Supp. 41.) The factual situations in those cases were essentially different from the instant case. There, at the time of filing the complaints and prior to May 14, 1947, the names of all claimants were "set forth in the schedules annexed to the complaints" (73 Fed. Supp. at p. 751), or the "agent-plaintiffs had, and exhibited as part of their complaints, authority in writing from the individual employees to maintain suits in the form prescribed" (74 Fed. Supp. at p. 42).

In all of the foregoing cases cited by appellants, it clearly appears that the "similarly situated" claimants in whose behalf the actions were urged were all identified in pleadings on file in the actions prior to the critical date of May 14, 1947, and had been so treated by the litigants and the court. Obviously, such cases and the declarations of courts with respect thereto must be distinguished from the instant situation where there was no identification of the seven appellants until a date subsequent to May 14, 1947, at which time they became entirely amenable to the "written consent" requirements and other provisions of the Portal-to-Portal Act.

Lockwood v. Hercules Powder Co. (D. C. W. D. Mo. 1948), 78 Fed. Supp. 716 (appeal dismissed, 8 Cir., 1949, 172 F. 2d 775), fully supports appellee's foregoing contention. In that case, there was commenced in August, 1946, a representative action under the Fair Labor Standards Act of 1938, wherein the original complaint contained the name of a single plaintiff who purported to maintain the action on behalf of himself and all other similarly sit-

uated employees of defendant. In March, 1947, pursuant to court order, plaintiff filed a First Amended Complaint in which he named 215 employees on whose behalf he purported to bring the action. On September 9, 1947, in attempting to fulfill the requirements of Section 8 of the Portal-to-Portal Act, a Second Amended Petition was filed. It "contains the names, in the body thereof, of the two hundred fifteen (215) employees above referred to, and with respect to them plaintiff alleges that 'he has been specifically authorized to act and does bring this action not only for himself, but for' their benefit." The court pointed out that "Plaintiff does not allege that each such claimant has executed a 'written consent' to become a party plaintiff in this action, and no such 'written consent' has been filed herein by or on behalf of any of said employees." In ordering the claims of all these similarly situated employees dismissed, the court stated that Section 8 of the Portal-to-Portal Act "makes a condition precedent to the continued maintenance of such action on behalf of other employees the filing in Court of the 'written consent' there required. Failure to file such 'written consent' bars further maintenance and prosecution of representative actions * * * on behalf of employees not named as plaintiffs."

It is noteworthy that the *Lockwood* case is much stronger from the viewpoint of the employees' claims than is the instant case, for in that case the names of the 215 employees appeared in the Second Amended Petition which was on file with the court approximately two months prior to the enactment of the Portal-to-Portal Act, whereas, in the instant case the appellants' names first appeared in a bill of particulars filed June 5, 1947. In effect, the court in the *Lockwood* case held that the naming of the numerous employees in the body of the Second Amended

Petition did not constitute them "plaintiffs" within the meaning of the Portal-to-Portal Act, so that after passage of the Act they became amenable to the "written consent" requirements of Section 8, and having failed to comply therewith within the allowed period of time, their claims were properly dismissible. For like reasons, the claims of the seven appellants herein were properly dismissed.

3. Appellants' Claims Were Dismissible for Want of Jurisdictional Allegations in the Amended Complaint.

The trial court's order of dismissal as to the seven appellants is supportable on the alternative ground that neither the original complaint nor the amended complaint contains sufficient allegations anent the jurisdiction of the court to state a claim for relief.

Recently, in a comparable case, this Court upheld an order dismissing an amended complaint, basing its decision upon the failure of the amended complaint to plead the jurisdictional elements required by the Portal-to-Portal Act, even though such ground of infirmity had not been suggested to or considered by the District Court. (See *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432, 434, 436.)

In the present case, the original plaintiffs probably, and quite understandably, did not anticipate in January, 1947, the requirements of the Portal-to-Portal Act which would become applicable to the litigation as it progressed in the trial court, and consequently no attempt whatever was made in the original complaint to allege that the services for which compensation was claimed were performed pursuant to custom or written or oral contract.. However,

the amended complaint was definitely prepared with the Portal-to-Portal Act requirements in mind. Paragraph VIII of the amended complaint [Tr. p. 23] alleges as follows:

> "The activities which the plaintiffs and said other employees similarly situated performed during each of said one-half (½) hours each day were and are compensable activities within the meaning of the Fair Labor Standards Act of 1938, as amended by the Portal-to-Portal Act of 1947 by virtue of and in accordance with the express provision of a written collective bargaining agreement then in effect between the plaintiffs, their collective bargaining representatives and the defendant."

The foregoing allegations obviously paraphrase the statutory language contained in Section 2(a) (1) and (2) of the Portal-to-Portal Act (29 U. S. C., §252(a) (1) and (2)). Nevertheless, it is the view of a majority of federal courts which have considered the question that such allegations are insufficient to show the jurisdiction of the District Court.

An identical situation was presented in *Story v. Todd Houston S. Corp.* (D. C. S. D. Tex., 1947), 72 Fed. Supp. 690, where the Court stated (p. 694):

> "While they plead a written contract they do not plead an express provision thereof showing such liability. Under the Portal-to-Portal Act of 1947 this court no longer has jurisdiction of this case."

A comparable situation also arose in *Coyle v. Philadelphia Macaroni Co.* (D. C. E. D. Pa., 1949), 9 F. R. D. 331. There, the Court ruled upon the sufficiency of the complaints in four actions which contained substantially identi-

cal allegations. The Court said (9 F. R. D. at pp. 333-334):

> "In so far as the actions seek to enforce liability for activities engaged in prior to May 14, 1947, the averments of the amended complaints do not set forth sufficient facts to permit this court to take jurisdiction over the subject matter. The failure to assert, as in paragraphs VII and IX, of the complaints, that the specific provisions of a contract and that the activities involved were compensable by those provisions, or facts from which a custom or practice to compensate may be inferred is fatal to the complaint. *Sinclair v. United States Gypsum Co.,* D. C. W. D. N. Y., 81 F. Supp. 365; *Hays v. Hercules Powder Co.,* D. C. Mo., 7 F. R. D. 747. Allegations, as in paragraphs VIII of the complaints, merely couched in or paraphrased in the language of the Portal-to-Portal Act will not suffice. *Sadler v. W. S. Dickey Clay Manufacturing Company,* D. C. W. D. Mo., 78 F. Supp. 616. Also see *Hutchings v. Lando,* D. C. S. D. N. Y., 83 F. Supp. 615; *Smith v. Cudahy Packing Co.,* D. C. Minn., 76 F. Supp. 575; *Borucki v. Continental Baking Co.,* D. C. N. Y., 74 F. Supp. 815; *Moeller v. Eastern Gas & Fuel Associates,* D. C. Mass., 74 F. Supp. 937."

In *Hutchings v. Lando* (D. C. S. D. N. Y., 1949), 83 Fed. Supp. 615, the Court held a complaint substantially identical to the present one to be insufficient for the following reasons (83 Fed. Supp. at p. 616):

> "A general allegation in the language of the statute that activities were compensable under an express provision of the contract, without setting forth the contract or particular provision thereof or facts in support of such allegation is insufficient to cure the

jurisdictional defect. *Smith v. Cudahy Packing Company,* D. C., 76 F. Supp. 575; *Sadler v. W. S. Dickey Clay Manufacturing Co.,* D. C., 78 F. Supp. 616; *Johnson v. Park City Consolidated Mines Company,* D. C., 73 F. Supp. 852, cited with approval in *Battaglia v. General Motors Corporation, supra* [2 Cir., 169 F. 2d 254]; *Story v. Todd Houston Shipbuilding Corporation,* D. C., 72 F. Supp. 690, cited with approval in *Battaglia v. General Motors Corporation, supra.*"

To like effect see:

Tipton v. Bearl Sprott Co. (9 Cir., 1949), 175 F. 2d 432, 436;

Newson v. E. I. DuPont de Nemours & Co. (6 Cir., 1949), 173 F. 2d 856;

Bumpus v. Remington Arms Co. (W. D. Mo., 1948), 77 Fed. Supp. 94, 97.

Also see:

Bonner v. Elizabeth Arden, Inc. (2 Cir., 1949), 179 F. 2d 703, which affirmed D. C. S. D. N. Y., 80 Fed. Supp. 243.

Cf. Manosky v. Bethlehem Hingham S. Corp. (D. C. Mass., 1938), 16 Labor Cases, par. 64895; *Idem.* (D. C. Mass., 1949), 16 Labor Cases, par. 65045, which also is to like effect. Although the Court of Appeals recently reversed with one judge dissenting (1 Cir., 1949), 17 Labor Cases, par. 65412, the majority opinion appears irreconcilable with this Court's opinion in *Tipton v. Bearl Sprott Co.* (9 Cir., 1949), 175 F. 2d 432.

In light of the fact that the claimants in this action were accorded full opportunity to file an amended com-

plaint for the primary purpose of indicating to the trial court its jurisdiction of their claims, and the fact that they have failed to satisfactorily make such a showing in the amended complaint which they filed April 6, 1949, their claims were properly dismissible on that ground, which was one of several grounds urged by appellee in the court below as a basis for dismissal.

Conclusion.

In the event this Court should be disposed in the instant case to liberally construe the Portal-to-Portal Act in a manner sympathetic to appellants' contentions, it should be deterred from so doing out of respect for the forcefully clear statement of legislative "Findings and Policy" contained in Part I, Section 1, of the Portal-to-Portal Act. The Congressional statement, a full reading of which is recommended, points up the serious and unjust results which followed from the unduly liberal judicial interpretations of the Fair Labor Standards Act. In part, Congress stated as follows:

> "(a) The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers * * *."

Just recently, in *Lassiter v. Guy F. Atkinson Co.* (9 Cir., 1949), 176 F. 2d 984, at page 993, this court expressed recognition that the Portal-to-Portal Act "is remedial legislation and it must be interpreted with this in mind lest we do violence to the intent of Congress."

For the reasons indicated in this brief, appellee contends that the present appeal should be dismissed. Alternatively, if the Court elects to consider the appeal upon its merits, appellee submits that the District Court's order dismissing the claims of the seven appellants should be affirmed.

Respectfully submitted,

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